Supreme Court, U. S.
FILED
NOV 27 1978
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1571

DELAWARE,
Petitioner,

v.

WILLIAM J. PROUSE, III

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF DELAWARE

PETITION FOR CERTIORARI FILED MAY 2, 1978
CERTIORARI GRANTED OCTOBER 2, 1978

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Appendix.

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE

v.

WILLIAM J. PROUSE, III

(GREGG E. WILSON, ESQ., D.A.G.) STATE OF DELAWARE *v.* WILLIAM J. PROUSE, III (DAVID M. LUKOFF, ESQ., ASST. P.D.)	I-76-12-0213—POSSESSION OF A NON-NARCOTIC SCHEDULE I CONTROLLED SUBSTANCE. TO WIT: MARIJUANA.

11/30/76	Arrest Date.
12/13/76	Waived Prelim'y Hrg.
12/14/76	Warrant issued thru JP 15, #76-11-0998. $250.00 Unsec. Bail Bond from JP 15.

	#1.	1/13/77	True Bill.
BIFFERATO, J.		1/27/77	Arraigned, Waived Readg., Entered Plea of Not Guilty. Trial 2-15-77. (LUKOFF, ESQ.)
	2.	1/28/77	Copy of Deft. Request for DSC.
WALSH, J.	3.	2/15/77	Suppression Hrg: Reserved Decision.
	4.	2/18/77	Copy of Deft. Memorandum in Support of Mtn. to Suppress.
	5.	3/ 7/77	Copy of States Memorandum in Opposition to Deft. Mtn. to Suppress Evidence.
	6.	3/15/77	Certificate Pursuant to 10 Del. C. §9902(b) Will Be Presented to Judge Walsh.
WALSH, J.	7.	3/10/77	Deft. Mtn. to Suppress—Granted.
WALSH, J.		3/16/77	Paper #6—Signed.
	8.	3/29/77	State's request for Transcript.
	9.	5/27/77	Transcript of Suppression Hearing.

#10.	6/21/77	Copy of State's Notice of Appeal Purs. to 11 Del. C § 9902, Supreme Court § 102, 1977.
11.	7/12/77	Copy of State's Certification Pursuant to Supreme Court Rule 7(8) and State's Request for Transcript.
12.	7/12/77	Records Sent to Supreme Court.
13.	7/15/77	Acknowledged Receipt of Records Recd. From Supreme Court.

IN THE SUPREME COURT OF THE STATE OF DELAWARE

1977 TERM

WILSON
102.
LUKOFF

STATE OF DELAWARE,

Plaintiff Below, Appellant,

v.

WILLIAM J. PROUSE, III,

Defendant Below, Appellee.

1977, March 24. Received and filed notice of appeal from the decision on March 10, 1977, of the Superior Court, in and for New Castle County, in No. I-76-12-0213.

1977, March 30. Received and filed appellants [sic] Certificate pursuant to Rule 7(8).

1977, July 14. Received and filed record including transcript. Counsel notified.

1977, August 3. Received and filed stipulation with Order dated August 3, 1977, extending time for filing of appellant's brief to August 8, 1977.

1977, August 10. Received and filed appellant's opening brief and appendix.

1977, September 26. Received and filed State's supplemental appendix.

1977, September 29. Received and filed appellee's answering brief.

1977, December 13. Argument held.

1978, February 1. Received and filed Opinion decided Jan. 30, 1978 affirming judgment of the Court below. Written by McNeilly, J.

1978, February 13. Record, mandate and Certified Copy of Opinion decided January 30, 1978 to Clerk of Court below.

MANUSCRIPT OF SUPPRESSION HEARING.

(Title Omitted in Printing.)

BEFORE:

HON. JOSEPH T. WALSH, J.

APPEARANCES:

GREGG E. WILSON, ESQ.
Deputy Attorney General
for the State of Delaware

DAVID M. LUKOFF, ESQ.
Assistant Public Defender
for the Defendant.

TRANSCRIPT OF SUPPRESSION HEARING

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[3]

Courtroom No. 1
11:00 o'clock a.m.
February 15, 1977

PRESENT:

(Counsel for the respective parties presented their opening addresses to the Court.)

STATE'S EVIDENCE

ANTHONY JOSEPH AVENA

ANTHONY JOSEPH AVENA, called as a witness on the part and behalf of the State, being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WILSON:

Q. Patrolman Avena, who do you work for?
A. New Castle County Police.
Q. How long have you been employed by New Castle County Police?
A. Two years this past January.
Q. What are your duties with them?
A. Patrol.
Q. What type of patrol is this?
A. Uniform patrol, a marked unit.
Q. What type of enforcement do you do?

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A. Both criminal and traffic, as well as answering complaints.

Q. Do you spend part of your time enforcing the traffic laws in the State of Delaware?

A. Yes, sir.

Q. I direct your attention to the 30th of November, 1976, Miles and New York Avenue, Radnor Green. Did you have an opportunity to encounter the Defendant?

A. Yes, sir.

Q. Would you describe the circumstances?

A. The vehicle, I believe, was first seen by myself on Green Street, in the area of Green and Commonwealth, if I remember correctly. At that time, I followed the vehicle to the place where I had stopped it. When I got to that particular area I pulled the vehicle over. It was more or

less a routine check, basically just to check the driver's license and registration.

When I got to the back of the vehicle, the window was open, partly, partly open, and I could smell what I believed to be marijuana coming from the vehicle. I then spoke with the subject that was sitting in that spot and asked him if there was any marijuana in the vehicle and he said, "No, it was a cigarette." I feel I

[5]

could tell the difference.

I went back to my car and asked for an additional unit, since there were four people in the car.

Q. Why did you call for an additional unit? Would you have done this under a normal traffic stop or——

A. With the circumstances involved and believing there were drugs in the car, I wanted to have somebody else there with me.

Q. What happened next?

A. Prior to the other vehicle coming, I went back to the car and asked the subjects to exit the vehicle; I started talking to them. At that time, I looked in the back seat—the front—the front seat by the passenger's side, looking into the vehicle. I could see a cellophane bag sticking out from underneath the seat, and I pulled it out and it contained some green plant-like material.

At that time, Patrolman Alfree, I believe, read the subjects their rights, and I subsequently rechecked——

Well, there were three guys and one girl. We started to pat them down and that's when the marijuana was found on Mr. Prouse.

[6]

Q. Marijuana concerned in this particular case, then, is marijuana found on the body of Mr. Prouse?

A. I believe so. I wasn't looking directly at the actual search because I had three other people I was tied up with. I did see it when it was taken, and I believe it was in a cigarette pack, if I'm not mistaken, and at that time it was put on the hood of the car, and at that time he was placed under arrest, also.

Q. The Mr. Prouse that you referred to, is he in the courtroom?

A. I believe that is him sitting there, it looks like him.

Q. Going back to this stop that you made, what, again, was the purpose of it?

A. Basically, I told Officer Humphrey I checked for license and registration, I had no other traffic violations or criminal activity.

Q. Do you do this often during your duties as a patrol officer?

A. I have done it before. I wouldn't say often, but I have done it before.

Q. Do you do this in a random manner?

A. Basically, yes.

[7]

Q. Was it in a random manner you stopped the Defendant on that particular day?

A. I saw the car in the area and wasn't answering any complaints, so I decided to pull them off.

Q. You saw the car and had time to make a license check?

A. That is right.

Q. Do you make license checks when you have an opportunity, when you are not responding to other criminal complaints and other vehicles?

A. I have done it several times. I don't make it a habit.

Mr. Wilson: No further questions.

CROSS-EXAMINATION

By Mr. Lukoff:

Q. Patrolman Avena, you indicated this was essentially a routine check?

A. Yes, sir.

Q. There was nothing about the car that was suspicious, I gather?

A. Not to my recollection, no.

Q. And they weren't driving erratically?

A. No.

[8]

Q. No traffic violations?

A. None.

Q. No traffic violations, no erratic driving, and the only reason you stopped, to see if the driver's license or registration was okay?

A. More or less, I guess.

Q. Did you think there was any crime afoot?

A. Not at that time.

Q. So it was only after you had the car pull over that you went up to it and at that point you noticed the odor of marijuana?

A. What I believed to be marijuana, yes, sir.

Q. Where was Mr. Prouse sitting?

A. I will be honest with you, I am not sure who was driving the car. I know the car was registered to him, but I don't know who was driving.

Q. Would your report show?

A. I don't think so. I usually put it in there, but I don't believe it is indicated on there.

Q. What you classify one, suspect one as necessarily being the driver or the first one you would talk to?

A. Not basically, no.

Q. Do you know if Mr. Prouse was the person seated

[9]

where you found the cellophane bag?

A. No, he wasn't in the back seat.

Q. The cellophane bag was in the back?

A. Well, it was underneath the front seat but more towards the back of the vehicle, so if you were in the back seat you would be able to see it sticking out.

Q. It appeared, if it was there, the passenger in the back would have the visibility, whereas someone seated in the front obviously couldn't see it, I presume.

A. I don't think you would be able to see it from the front. If it was put by somebody in the front seat, they would have to reach down and stick it pretty far in, to put it in.

Q. In other words, kind of an awkward action to put it all the way back.

A. I would say.

Q. Mr. Prouse was in the front, you are sure of that?

A. Well, a girl in the back and another subject, the way I recall.

Q. Did you ever check to see if anybody had a license?

A. I believe identification was gotten from them

[10]

once we got them out of the vehicle.

Q. What would be your normal procedure? Would you normally go up to the driver of a car under the circumstances as you presented them? Wouldn't that be the first person you would go to?

A. I think if I didn't smell the marijuana from the back seat I probably would have.

Q. You can't say if Mr. Robert Wright was the driver, or Mr. Richard Wright, or Mr. Prouse, but you are sure it wasn't a woman?

A. No, it wasn't a girl.

Q. Is this a copy of your report?

A. Yes, sir.

Q. That is?

A. Yes, sir.

Q. I note on there is one Richard Wright, S2, Richard Prouse.

A. That is right, William Prouse.

Q. From that you wouldn't assume he was the driver?

A. I don't believe he was the driver. It indicates here S1 arrested for possession of marijuana. As I recall, he was in the back seat with a girl, to my recollection.

Q. Is this a normal routine thing that the police

[11]

department says you should do, is to stop vehicles?

A. It's been done before.

Q. That isn't my question. Does your Department say, when you don't have anything else you're doing and moving around, to just stop a car and check them for license and registration?

A. I don't believe there's any set standards or procedures. It's all——

Q. Are there any guidelines that come out from the Attorney General on this thing?

A. Not to my recollection.

Q. It is something you did, you have done it before on a couple of occasions?

A. I would say yes.

Mr. Lukoff: I have no further questions, Your Honor.

REDIRECT EXAMINATION

By Mr. Wilson:

Q. Patrolman, there were two packages of marijuana found, one in the back seat that you found at first.

A. Yes.

Q. And then the other was found on the Defendant by Patrolman Humphrey.

[12]

A. Yes.

Q. And Patrolman Humphrey made the actual arrest of the Defendant?

A. That is correct.

Q. Did the odor of marijuana pervade the whole car?

A. That is correct. It was fairly strong.

Mr. Wilson: Nothing further.

RECROSS-EXAMINATION

By Mr. Lukoff:

Q. Patrolman Avena, you prepared the first two pages of this report, yourself?

A. Yes.

Mr. Lukoff: Your Honor, for purposes of the hearing, I would suggest this is a 3507-type prior statement, and I would request the Court for an opportunity to review as to his recollection of the events.

I don't know if the Court can ascertain who was the driver or not, but we are not——

The Court: Does it make any difference who was the driver?

Mr. Lukoff: I'm not sure it really does, Your Honor, under those circumstances because we are talk-

ing about stuff taken from the person of Mr. Prouse rather than

[13]

the vehicle stuff, I presume.

The Court: Does it follow, the taking of marijuana is good in that sense, if the stuff was bad——

Mr. Lukoff: If the stuff was bad, I guess everything that followed is bad. If the stuff was good, the question becomes what says—if Mr. Prouse is a passenger in the vehicle where this odor is, what authority is there to search him specifically?

I am not sure it necessarily follows that everything after is good. We are not disagreeing that Mr. Prouse had something on him. The question is, one, whether the police had the right to stop the vehicle and whether, even if they did, could they then search him under those circumstances? And we will agree that he was searched by the other officer. We have no problem with that.

I would submit that the report shows the basis—tells the officer's recollection then of how things happened, which I think is pretty much what he has testified to.

The Court: Do you have any objection to the report going in, Mr. Wilson?

Mr. Wilson: No, Your Honor, I don't have any objections.

The Court: It will be marked Defendant's Exhibit

[14]

(The police report was marked "Defendant's Exhibit 1.")

Mr. Lukoff: I have no further questions of this officer, Your Honor.

The Court: Is there anything further of this witness, Mr. Wilson?

Mr. Wilson: No, Your Honor.

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STATE OF DELAWARE:
NEW CASTLE COUNTY: } SS:

I, MORRIS D. PEARSON, Official Court Reporter of the Superior Court, State of Delaware, do hereby certify that the foregoing is an accurate transcript of the proceedings, as reported by me, in the Superior Court of the State of Delaware, in and for New Castle County, in the case therein stated as the said remains of record in the Office of the Prothonotary at Wilmington, Delaware.

WITNESS my hand this ..... day of ....., A. D., 1977.

.....
OFFICIAL COURT REPORTER

OPINION AND ORDER OF THE SUPERIOR COURT OF THE STATE OF DELAWARE.

SUPERIOR COURT
OF THE
STATE OF DELAWARE

JOSEPH T. WALSH
Judge

Court House
Wilmington, De. 19801

Gregg E. Wilson, Esq.
Deputy Attorney General
The Wilmington Tower
Wilmington, Delaware 19801

David M. Lukoff, Esq.
Assistant Public Defender
200 Odd Fellows Building
Wilmington, Delaware 19801

RE: State v. William J. Prouse
I76-12-0213

Submitted: March 4, 1977
Decided: March 10, 1977

Gentlemen:

Defendant, charged with Possession of Marijuana, has moved to suppress the evidence against him on the ground that the seizure of the contraband arose from an unauthorized detention of him by the police. The Court conducted an evidential hearing at which the sole witness was the arresting police officer. After the filing of memoranda this is the Court's decision on the motion.

The arresting officer testified that on November 30, 1976, at approximately 7:20 p.m. while on routine paroie he decided to stop a motor vehicle operated by the defendant for a routine driver's license and registration check. He testified that he observed no traffic violations; no motor vehicle equipment violations; no erratic or unusual driving and neither the lateness of the hour nor the location of the automobile gave him any suspicion that the driver or the occupants were engaged in improper activity. The officer testified that when he approached the automobile he smelled what appeared to him to be burning marijuana and upon asking the occupants to emerge from the car he saw a cellophane bag protruding from under the seat. This, in turn, led to the search of the persons of the occupants. Upon the defendant was found material which the State contends was marijuana.

The State concedes that there was no basis for the officer's stopping of this automobile other than his desire to conduct a license and registration check on a random basis. Defendant contends that such a stop is a detention without cause and constitutionally improper.

The lawfulness of a seizure of evidence which stems from a detention for a routine license or registration check has been the comment of decisions in several jurisdictions. While the decisions are not uniform, the trend appears to be one of validating such seizures where the same are the product of systematic checks under objective standards. Thus, approval has been given to seizures resulting from road blocks on the theory that such monitoring is indiscriminate and not based on the whim or caprice of the police officer. Several decisions relied upon by the State involve seizures arising from road blocks and are thus clearly distinguishable. *State v. Smolen*, App. Div. Conn., 232 A. 2d 339 (1967); *City of Miami v. Aronovitz*, Supr. Ct.

Fla., 114 So. 2d 784 (1959); *State v. Severance*, N. H. Supr., 237 A. 2d 683 (1968). Equally distinguishable are those decisions in which the motivation for the stop was the lateness of the hour or suspicious activities or appearance of the driver or occupants. *Glover v. State of Maryland*, Md. App., 287 A. 2d 333 (1972); *State v. Braxton*, N. J. Super., 268 A. 2d 40 (1970); *State v. Allen*, N. C. Supr., 194 S. E. 2d 9 (1973); *State v. Williams*, S. C. Supr., 116 S. E. 2d 858 (1960). Two cases advanced by the State appear to sanction a non-systematic random stop for license checks. *Palmore v. U. S.*, D. C. App., 290 A. 2d 573 (1972); *State v. Holmberg*, Neb. Supr., 231 N. W. 2d 672 (1975).

The New York Court of Appeals in *People v. Ingle*, N. Y. Ct. App., 369 N. Y. S. 2d 67 (1976) reversed the conviction of a defendant from whom drugs were seized in a factual situation identical to that now under consideration. The Court pointed out that there must be some valid reason, however slight, for the singling out of a particular automobile and its operator for a stop and an inspection to determine compliance with the motor vehicle law. The Court went on to note that a routine check of automobiles by some non-arbitrary, systematic procedure such as a road block or check point is permissible but where there is no systematic routine or objective standard against which to test the stop it can only be assumed that the stop is the result of "arbitrary caprice or curiosity" by the officer. In *Ingle* the Court rejected the contention that the right to drive was a privilege, pointing out that such a distinction is not given common acceptance and gratuitous, arbitrary or unjustified restraint by the government regardless of its context is not to be condoned. The Court emphasized that the factual basis required to support a traffic stop may be minimal, that is, not rising to the level of probable cause.

The Supreme Court of Pennsylvania has adopted a similar approach in *Commonwealth v. Swanger*, Supr. Ct. Pa., 307 A. 2d 875 (1973). To the same effect is *State v. Fisher*, Ct. App. Ore., 484 P. 2d 864 (1971).

I conclude that the rationale of *Ingle* and *Swanger* represents the better view that an arbitrary, unsystematized license check without objective standards has no legal sanction. It should be emphasized that the Court is limiting this decision to a capricious stop. This holding is not intended to apply to road blocks or other systematic traffic checks. In any event, I am satisfied that the stop by the officer in this case was without authority and any evidence secured as a result of that stop must be suppressed. Accordingly, the motion to suppress is granted.

IT IS SO ORDERED.

Very truly yours,

/s/ JOSEPH T. WALSH

JTW: llf
cc: Prothonotary

OPINION OF THE SUPREME COURT OF THE STATE OF DELAWARE.

IN THE SUPREME COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,
Plaintiff Below,
Appellant,
v.
WILLIAM J. PROUSE, III,
Defendant Below,
Appellee.

No. 102, 1977.

Submitted: December 13, 1977

Decided: January 30, 1978

Before HERRMANN, *Chief Justice*, DUFFY and MCNEILLY, *Justices*.

Upon appeal from Superior Court. Affirmed.

Gregg E. Wilson, Deputy Attorney General, Wilmington, for plaintiff below, appellant.

David M. Lukoff, Assistant Public Defender, Wilmington, for defendant below, appellee.

MCNEILLY, Justice

The State of Delaware appeals, pursuant to 10 *Del. C.* § 9902(b) and (c),* a Superior Court order which granted defendant's motion to suppress evidence. The challenged evidence was obtained by police during a random stop of defendant's automobile, and the issue raised is whether the police may arbitrarily stop and detain persons operating motor vehicles when the officers involved have no reasonable suspicion that the occupants of the stopped vehicle have or will violate the law. Because we are of the opinion that non-systematic stops by police, who have no reasonable suspicion that a legal violation has occurred, violate Federal and State constitutional guarantees, we affirm the Superior Court order and dismiss this appeal.

I.

While on routine patrol Officer Anthony Avena of the New Castle County Police stopped an automobile operated by defendant-Prouse to conduct a driver's license and vehicle registration check. Prior to the stop the officer observed no traffic or equipment violations, and had no

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* 10 *Del. C.* § 9902(b) and (c) read as follows:

§ 9902. Appeal as of right.

(b) When any order is entered before trial in any court suppressing or excluding substantial and material evidence, the court, upon certification by the Attorney General that the evidence is essential to the prosecution of the case, shall dismiss the complaint, indictment or information or any count thereof to the proof of which the evidence suppressed or excluded is essential. Upon ordering the complaint, indictment or information or any count thereof dismissed pursuant to the Attorney General's certification, the reasons of the dismissal shall be set forth in the order entered upon the record.

(c) The State shall have an absolute right of appeal to an appellate court from an order entered pursuant to subsection (b) of this section and if the appellate court upon review of the order suppressing evidence shall reverse the dismissal, the defendant may be subjected to trial. (10 Del. C. 1953, § 9902; 57 Del. Laws, c. 133; 58 Del. Laws, c. 412, § 1.)

indication that any criminal activity had been or would be perpetrated by defendant or the other occupants of his car. Officer Avena candidly testified that defendant's car was randomly chosen from other vehicles on the road to be the subject of a license and registration check, and that he regularly made similar routine stops of motor vehicles when not answering complaints. As the officer approached defendant's automobile he smelled the aroma of marijuana emanating from the car. While observing the occupants of the car step out into the street, Officer Avena noticed a cellophane bag containing leafy vegetable matter protruding from under the front seat. Suspecting that it contained marijuana, Officer Avena seized the bag and, thereafter, placed defendant under arrest. Subsequently, defendant was indicted for possession of a non-narcotic Schedule I substance in violation of 16 *Del. C.* § 4754.*

Defendant moved in Superior Court for an order suppressing the evidence against him on the ground that it had been obtained during an illegal detention. After an evidentiary hearing the Superior Court granted defendant's motion. The State concedes that defendant was detained in circumstances where the investigating officer had no reasonable suspicion that any criminal activity or motor vehicle violation had or would take place. However, the State asserts that the practice of randomly stopping motor

* 16 *Del. C.* § 4754 reads as follows:

§ 4754. Prohibited acts D; penalties.

It is unlawful for any person knowingly or intentionally to possess, use or consume any controlled substance or counterfeit substance classified in Schedule I, II, III, IV or V not a narcotic drug unless the substance was obtained directly from or pursuant to a valid prescription or order of a practitioner while acting in the course of his professional practice or except as otherwise authorized by this chapter. Any person who violates this section upon conviction shall be fined not more than $500 and imprisoned not more than 2 years. (16 Del. C. 1953, § 4754; 58 Del. Laws, c. 424, § 1.)

vehicles for license and registration examinations is both constitutionally permissible, and necessary to properly enforce motor vehicle regulations.

The issue of the legal validity of systematic, roadblock-type stops of a number of vehicles for license and vehicle registration check is *not* now before the Court. Systematic stopping procedures entail limited exercise of discretion concerning which vehicles to stop, and, therefore, pose legal issues different in nature from those presented by the random stop practice challenged here. We now focus on the competing State and individual interests which must be examined in order to determine the validity of random stopping procedures.

II.

The Fourth Amendment to the United States Constitution provides;

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The constitutional proscription against unreasonable searches and seizures is made applicable to the States by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Mapp v. Ohio*, 367 U. S. 643 (1961); *United States ex rel. Dyton v. Ellingsworth*, 306 F. Supp. 231 (D. Del. 1969). The Delaware Constitution Article I, § 6 is substantially similar to the Fourth Amendment and a violation of the latter is necessarily a violation of the former. *State v. Moore*, Del. Super., 187

A. 2d 807 (1963). Evidence seized in disregard of these constitutional provisions is inadmissible at the trial of the person whose rights have been violated. *Mapp v. Ohio, supra; Schaffer v. State,* Del. Supr., 184 A. 2d 689 (1962). The precise legal issue raised in this appeal is whether the stop of defendant's automobile was an unconstitutional seizure within the meaning of the Fourth and Fourteenth Amendents. While a temporary stop or detention of a motor vehicle and its occupants is not normally described as a seizure, the Fourth Amendment has been construed to protect against unreasonable governmental intrusions into the privacy of the individual, regardless of whether they are labeled stops, detentions, frisks or seizures. *Terry v. Ohio,* 392 U. S. 1 (1968); *Sibron v. New York,* 392 U. S. 40 (1968). Therefore, since the police action here entailed an interference with defendant's right to free access to public highways, it is an official intrusion which must be examined to see if it accords with Fourth Amendment requirements. If the police acted unreasonably then the evidence gathered as a result of their activities must be suppressed. *Schaffer v. State, supra.*

A search or seizure pursuant to a duly issued warrant is presumptively valid because a determination of the reasonableness of the intended action is made prior to its inception by a neutral Magistrate. *Johnson v. United States,* 333 U. S. 10 (1948); *Saienni v. State,* Del. Supr., 346 A. 2d 152 (1975). There are instances in which a warrant is unnecessary for a legitimate search and seizure due to circumstances which make a warrantless search reasonable. See *Carroll v. United States,* 267 U. S. 132 (1925). Included within the warrant exception are cases where law officers have probable cause to believe that an automobile, or other readily moveable vehicle, is carrying contraband, is being driven in violation of the motor ve-

hicle laws, or the occupants are or have been committing criminal violations. *Carroll v. United States, supra; Freeman v. State,* Del. Supr., 317 A. 2d 540 (1974). Where a legal arrest has been made, a police officer may search the arrested person without a warrant. *Ker v. California,* 374 U. S. 23 (1963); *Lido Social Club v. State,* Del. Super., 86 A. 2d 859 (1952). A protective frisk of one suspected of criminal activity may also be conducted by police. *Terry v. Ohio, supra.* The essential element necessary for a permissible governmental intrusion is reasonableness, with a constitutionally mandated preference for warrants absent exceptional circumstances. *Johnson v. United States, supra.*

Because an automobile was the subject of the stop in the case at bar, we may invoke the *Carroll* exception to eliminate any warrant requirement. However, absent here is the element of probable cause which was essential to the reasonableness and legitimacy of the search and seizure in *Carroll.* As the Court said in *Carroll*:

> It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travelers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official, authorized to search, probable cause for be-

> lieving that their vehicles are carrying contraband or illegal merchandise. *Carroll v. United States, supra,* at 153, 154.

We note that the *Carroll* decision has been cited with approval by the Supreme Court of the United States as recently as 1977. See *United States v. Ramsey,* — U. S. —, 97 S. Ct. 1972 (1977).

The search and seizure of defendant's vehicle must be justified, if at all, on grounds other than a finding that the investigating officer had probable cause to make the stop, since the State agrees that he did not. The critical question is whether there are any legitimizing factors present here which would justify the police action. The United States Supreme Court has set forth the following standard for judging the reasonableness of an official search or seizure:

> [I]t is necessary first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen, for there is no ready test for balancing the need to search [or seize] against the invasion which the search [or seizure] entails. *Terry v. Ohio,* supra at 20, 21.

The State seeks to justify the initial detention of defendant* on the ground that a documents check is a reasonable form of limited detention of those operating motor vehicles on State highways. The State points to the inherent

* We assume, as all counsel involved herein have, that if the initial detention of defendant was constitutional, all subsequent police acts were also since the marijuana was in the "plain view" of Officer Avena and as contraband it was subject to immediate seizure. *Ker v. California,* supra; *Miller v. State,* Del. Supr., 310 A. 2d 867 (1973).

danger involved in the operation of motor vehicles, as evidenced by the large number of traffic related injuries which occur in this State and the United States generally, and concludes that the State has a substantial interest in regulating the use of the highways, and enforcing its licensing and vehicle registration laws. The State contends that the most effective method of enforcing its licensing and registration laws is to randomly stop motorists to check compliance with those laws. The State completes its argument by asserting that because they are necessary to further a legitimate State interest, random vehicle stops for the limited purpose of conducting a documents check are reasonable and constitutional even in the absence of probable cause.

We rule that before the government may single out an automobile to stop it, there must exist specific facts justifying the intrusion. Conversely, a random stop in the absence of specific justifying facts is unreasonable and unconstitutional. See *Commonwealth v. Swanger,* Pa. Supr., 307 A. 2d 875 (1973), and *People v. Ingle,* N. Y. Ct. App., 369 N. Y. S. 2d 67 (1975). We recognize the legitimate state interest in enforcing licensing and registration laws, and note that in fact situations similar to that of the present case other courts have reached the conclusion that the state interests outweigh the interests of the individual. See *State v. Holmberg,* Neb. Supr., 231 N. W. 2d 672 (1975), and *State v. Williams,* S. C. Supr., 116 S. E. 2d 858 (1960). However, the factor which in our opinion makes random stops, absent justifying facts, unreasonable is the inherent arbitrariness of the procedure. The flaw in the process is that absolute discretion and authority is conferred upon the police to detain whomever they desire for whatever reason on the pretense of a documents check stop. Thus an officer prejudiced against any

visibly identifiable group could stop a disproportionate number of persons in the group. No discrimination has been shown in the stop under examination here, but the evil of the possibility of discriminatory stops does exist. If we were to accept the State's position, discriminatory stopping procedures could be practiced with little or no chance for judicial review.

It has been asserted that a rigid invalidity rule as we adopt here is too broad, and that only where actual discriminatory intent is shown to have motivated the stopping officer, or where a license check is used as a pretext to investigate unrelated crime, should the random stop be illegal. See *Palmore v. United States,* D. C. Ct. App., 290 A. 2d 573 (1972). However, burdening a criminal defendant with the task of proving that a police officer acted with an illegal subjective intent would as a practical matter emasculate any limited rule concerning random stopping procedures, and in turn, emasculate Fourth Amendment rights.*

We hold, therefore, that a random stop of a motorist in the absence of specific articulable facts which justify the stop by indicating a reasonable suspicion that a violation of the law has occurred is constitutionally impermissible and violative of the Fourth and Fourteenth Amendments to the United States Constitution. It follows that a random stop solely for the purpose of a documents check is an unreasonable and unconstitutional detention of those in the stopped vehicle. Because the stop in the present case was arbitrary, and not based on justifying facts, it was illegal, and the evidence gathered as a result of the stop must be excluded from defendant's trial. The

* For a thorough discussion of this important point See Note, Automobile License Checks and the Fourth Amendment, 60 Va. L. R. 666 (1974).

Superior Court order granting defendant's motion to suppress was correct as a matter of law.

AFFIRMED.